NO. 1045

IN THE

United States
Circuit Court of Appeals

Ninth Circuit.

APPEAL FROM UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF CALIFORNIA,

SOUTHERN DIVISION.

Southern Pacific Railroad Company, *et al.*,

Appellants and Defendants.

vs.

The United States.

Reply Brief for United States.

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I.

It is not intended in this reply brief to re-argue the questions or re-state the matter contained in the "Brief for United States" in this case.

We desire to correct some misapprehensions on the part of counsel for appellants, and to aid the court in determining the controversies between the parties.

The opinion of the court below, is at Record 123. The

decree of that court is at Record 114. The opinion of the Circuit Court referred to in the opinon in the present case in the Brown and Bray cases, is reported in 68, Federal, 333, and the opinion of the court below referred to in the opinion in the present case, is at 117 Federal, 544.

The opinion of this court in the Brown and Bray cases, is reported at 75 Federal, 85.

II.

The bill of complaint in the present case [Record 13] prays (1) for a cancellation of the patents to the lands described in the bill, (2) that the title of the United States to said lands be quieted, (3) that in case it shall appear that said lands or any of them have been sold by said company to *bona fide* purchasers, that a recovery may be had for the government value of such lands, and (4) for general equitable relief.

No objection was made in the court below by answer, plea or demurrer, to the court entertaining jurisdiction in equity, and it was for that reason that the court adopting its decision and opinion in 117 Federal, 544, held that the defendants (appellants here) had waived any right to object to the court entertaining jurisdiction in equity.

It was not until answer to the merits, replication and final completion of testimony and final argument upon the merits, that the defendant suggested that the court had no jurisdiction in equity.

III.

The suggestion in "Appellants' Reply Brief" [p. 4] that the grant to the Southern Pacific is a grant "to the amount" of ten odd sections per mile, might be misunderstood and lead to the thought that counsel was claiming that the grant to the Southern Pacific was a grant of *quantity* and not a grant of *specific lands* within certain place limits, with a right under certain conditions, to select indemnity for losses.

It has often been decided that the grant to the Southern Pacific as well as that to the Northern Pacific, which is in similar terms, is a grant of *specific lands* and also a grant *in præsenti*. The only lands so conveyed by the present grant and within the limits designated, were the public lands not reserved, sold or otherwise disposed, and free from pre-emption, or other claims or rights at the time of definite location.

United States v. Southern Pacific Railroad, 146 U. S. 570.

IV.

We respectfully submit to the court that the stipulations at pages 132, 133 and 488 of the record, to the effect that there still remains a vast quantity of lands within the Southern Pacific indemnity limits, which it has never selected and which are still open to such selection, cannot be contorted into a stipulation that there is any deficiency in the Southern Pacific grant.

As counsel for appellants admits, the Southern Pacific grant has not been finally adjusted and it cannot be as-

certained until such final adjustment, whether there will be any deficiency.

Oregon Railroad v. United States, 189 U. S. 103, 115.

If the Southern Pacific Railroad gets patents to all the lands it is entitled to, and described in the grant, there can be no deficiency, whatever the quantity may be.

All calculations made in the Interior Department of what the Southern Pacific might get, under its grants, was a calculation in gross, and embraced a theoretical quantity, not taking into calculation grants to other railroads within the Southern Pacific limits for which the Southern Pacific was not entitled to make indemnity selections.

It has been decided by this court by the Supreme Court of the United States and by the Circuit Court below, that one railroad company cannot select as indemnity nor make indemnity selections as for lands lost to it, which were granted to another railroad company, for another and distinct object of internal improvement, and that the forfeiture of the grant to such other railroad, could not inure to the benefit of the junior grantee.

Southern Pacific v. United States, 168 U. S. 1, 47;
Clark v. Herrington, 186 U. S. 206, 208;
Southern Pacific v. United States, 189 U. S. 147, 452;
Chicago Railroad v. United States, 159 U. S. 372, at page 375;
Sioux City Railroad v. United States, 159 U. S. 349, 366;
United States v. Southern Pacific Railroad, 117, F. 544.

This court said in United States v. Southern Pacific, 98 Federal 27, at page 40:

> "The law does not contemplate an indemnity for a loss which has never been sustained, and we think the Supreme Court has so determined, and the controversy has been closed." (Citing authorities.)

Within the limits of the Southern Pacific grants are several million acres of lands granted to other railroads, which were excepted from the Southern Pacific grant, restored to the public domain for the sole use and benefit of the United States, and for which the Southern Pacific could not select indemnity, as that right was given to the railroads to whom those grants were made.

V.

As to the other points discussed in appellants' Reply Brief, it is submitted that they are fully met by the "Brief for United States" in this case.

The bill as filed, sought a decree quieting title, cancellation of patents, determination of rights of *bona fide* purchasers, and recovery for value of lands in the hands of *bona fide* purchasers, and the decree granted the relief sought and did quiet the title of the United States and vacated any patents which had been issued as to certain lands, and by reason of the Southern Pacific having placed a portion of the lands beyond the reach of the court, by conveying them to third parties who held them as innocent purchasers, the court below granted a recovery for the government value of such lands.

No adequate reason has been suggested why such a suit may not be maintained in equity, nor why, when the court has taken jurisdiction of the cause upon several distinct and clearly established equitable grounds, that it may not go on and do complete justice between the parties, to avoid a multiplicity of actions, and upon the authorities cited in the opening brief for the government, we submit that the court may and should do so.

Respectfully submitted,

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